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IN THE

# Supreme Court of the United States

..... Term, 1972

No. ..... Misc.

FREDERICK COHN,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM SPARAGO
50 Court Street
Brooklyn, N. Y.
*Counsel for Petitioner*

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*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States*

FREDERICK COHN, petitioner herein, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, affirming the verdict of the United States District Court for the Southern District of New York rendered January 14, 1972, convicting Petitioner of the offenses of unlawfully, wilfully and knowingly transporting in interstate commerce securities of the value of $5,000 and more, knowing the same to have been stolen, converted and taken by fraud (Title 18, U.S. Code Section 2314.); conspiracy so to do (Title 18, U.S. Code, Section 371.), and sentencing him to imprisonment for a period of two years on each of the counts to run concurrently with each other.

## Citation to Opinions Below

The decision of the Court of Appeals was rendered on June 7, 1972, and was officially reported at [1]

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 7, 1972. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254 (1).

## Questions Presented

Whether the failure of the Trial Court to particularize the testimony for and against petitioner in a conspiracy case involving several tiers or levels of conspiracy and conduct, resulting in 815 pages of minutes, spanning some five continuous days of testimony in which petitioner's sole link to the conspiracy was by testimony of one witness, himself a confessed participant in the other level of the conspiracy, which testimony was sharply contradicted by independent witnesses, did not also result in the inability of the jury to consider the guilt of Petitioner separately, thereby depriving Petitioner of a fair trial and a deprivation of due process.

Whether the refusal by the District Court to permit cross examination of an admitted conspirator, who provided the testimony on the basis of which the jury found the Petitioner guilty and which witness was the sole link of the Petitioner to the originating level of the crime, as to facts and circumstances from which the jury could infer that the witness anticipated leniency as a reward for his testi-

[1] The Court of Appeals for the Second Circuit affirms Petitioner's conviction without opinion.

mony constitutes a denial of Petitioner's constitutionally granted right to cross examination under the Sixth and Fourteenth Amendments.

Whether the Trial Judge, by stating in the presence of the jury, while curtailing the Petitioner's cross examination of the conspirator who had pleaded guilty, that no deals are made in the Federal Court regarding sentences and that the Assistant United States Attorney cannot make any recommendations as to sentences, actually testified as a witness corroborating the lack of motive of the witness to fabricate and so violated Petitioner's rights to a fair trial and due process of law.

Whether the statement of the Trial Judge to the jury as to arrangements for leniency concerning a witness for the prosecution effectively constituted highly prejudicial testimony by the Court, not subject to cross examination or rebuttal, was a violation of Petitioner's constitutional rights under the Sixth and Fourteenth Amendments.

## Statement

A certain United States Treasury Bill in the amount of $50,000, No.730749A was stolen by a person or persons unknown. The Treasury Bill found its way into the possession of the Defendants other than Petitioner. All of the foregoing occurred at points in time prior to January 24, 1971.

On Sunday, January 24, 1971, William A. Burke, the witness referred to at the Questions Presented, an attorney and counselor-at-law, of the State of New York called, by telephone, Mr. Charles C. Mehrmann, an attorney and counselor-at-law of the State of New York and a Village Justice of the Incorporated Village of Freeport with offices in Freeport, requested an appointment with Judge Mehr-

mann and drove to his home (79, 80, 81, 82). Judge Mehrmann thereafter called Petitioner who came to the house some twenty minutes later (83, 84).

Mr. Burke testified that Judge Mehrmann thereupon left and that he had a conversation with Petitioner with respect to the treasury certificate in the course of which he told petitioner that he received it from someone named Dominick; that his friend told him it was not stolen; that no one would look for the treasury bill for three years; that his associate had paid 30% of the face amount for the treasury bill and that out of the net amount received from the sale of the treasury bill from the ultimate purchaser would be split three ways. (85, 86, 87, 88.)

Judge Mehrmann testified that Burke did call, did come to his home and that he, Judge Mehrmann, did have the petitioner, *a junior member of Judge Mehrmann's law firm*, come to his home and that a conversation was had between himself, Burke and petitioner, at which conversation he asked Burke if the instrument was legitimate, was assured that it was and he was (in *direct contradiction to Burke's testimony as to his absence*) present at the conversation which occupied between 30 and 60 minutes except for answering the telephone during which conversation Burke did not say anything about anyone named Dominick, did not say anything about a prior purchase and did not refer to any ultimate split. (496, 497, 498, 499, 500.)

On Tuesday, January 26, Burke arrived at the offices of Mehrmann & Hall and had a meeting with petitioner, Judge Mehrmann and Mr. Bernard Hall, the other partner in the firm. Burke testified that he told Mr. Hall that Burke could not get an affidavit and that he did not know who the true owner was. Mr. Hall thereupon returned the certificate to him, advising that without an affidavit as to ownership he would have nothing to do with it. (91, 92, 93, 94.)

Mr. Hall testified that at the meeting Burke told him he had a treasury bill that he wanted sold, that he (Mr Hall) knew nothing of treasury bills, that he requested Burke if he knew his client to be the actual owner of the treasury bill. Burke advised that this was the case and Mr. Hall stated that he wished an affidavit to that affect which Burke agreed to secure and provide. 536, 537, 538, 539.)

The treasury bill was checked out by Mr. Hall through his bank and he was advised by the bank that it was not stolen (570) and he so advised petitioner (554).

Judge Mehrmann testified (501, 502) that on February 4th between 11:30 A.M. and 11.45 A.M., Burke called him and advised that the affidavit of ownership was in the mail and that he, Judge Mehrmann, transmitted that information to Petitioner. This testimony *directly contravenes* the testimony of Burke (181, 182) in which Burke stated that he never told Judge Mehrmann that the affidavit was in the mail and he was not about to lie to Judge Mehrmann.

It is an uncontroverted fact that petitioner's only contact was with Burke who had been introduced to petitioner as a reputable attorney of good reputation and a personal friend of the senior partner of the firm by which petitioner was employed.

The testimony of Burke as to who was present during the course of the meeting at Judge Mehrmann's home, as to his statements with respect to the legitimacy of the ownership of the treasury bill and, with respect to the furnishing of the affidavit, were contraverted in numerous respects by Judge Mehrmann and Mr. Hall and by petitioner when he testified. The greater portion of the testimony of Mr. Burke dealt with his relations with the other conspirators with whom petitioner had no connection.

Mr. Burke was cross-examined by petitioner's attorney to establish that Burke believed that his testimony with respect to petitioner would, in Burke's belief, lead to leniency on the part of the Court, and as part of the cross-examination petitioner's attorney sought to elicit any and all conversations had with any persons connected with the government that would give Burke hope of leniency in exchange for testimony favorable to the prosecution. (166, 167).[2]

In the presence of the jury, it was stated by the trial Judge as follows:

> The Court: Let's get something straight. In the Federal Court nobody makes any deals regarding sentences, and the Assistant United States Attorney cannot make any recommendations to me as to what sentence I will impose.

*The foregoing statement was made in the presence of the jury.*

The Trial Court, in its charge, stated (776) that:

> "The guilt or innocence of Rallo, Cohn and Michaels should be determined solely from the evidence produced at this trial by way of oral testimony and exhibits".

The Court further charged that: (776)

> "I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions".

---

[2] It may be noted that Burke received a suspended sentence.

## Reasons for Granting the Writ

### I

The Trial Court failed to particularize the evidence against and for Defendant-Appellant notwithstanding the fact that the action was based upon a conspiracy and that this Defendant-Appellant was a second level conspirator.

In the absence of clear instructions to the jury meticulously particularizing the facts to be considered, Appellant was prevented from having a jury, with respect to him, consider only that evidence applicable to him. This resulted in deprivation to Appellant of his day in Court.

In the case of *Schaffer* v. *United States,* 362 U.S. 511 at pp. 516, the Court held that:

> "Moreover the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to that testimony the jury was not to consider but also as to that evidence which was available in the consideration of the guilt of each petitioner separately under the respective substantive courts."

In the case of *United States* v. *Gilbert* 31 F. Supp 195, it was set forth that:

> "The rights of each Defendant can be carefully guarded by the trial judge in the charge to the jury . . ."

The Defendant-Appellant's rights were not protected by a charge by the Trial Court to enable the jury to clearly understand the evidence against him and the rebuttal evidence, and have guidelines to use in passing upon the credibility of the witnesses. The result in a conspiracy trial involving several defendants, voluminous testimony showing guilt on one level of the conspiracy (Burke, et al) was

to allow the jury freedom to convict Defendant-Appellant on the basis of proof of the guilt of the others. Notwithstanding the trial court's feeling that the jury should remember all of the testimony and be able to find the necessary testimony as to each defendant, the jury in its request for testimony (800) only requested the testimony of Burke as to the meeting in Judge Mehrmann's house and at the offices of Mehrmann & Hall and Cohn's testimony with rsepect thereto. The testimony of Judge Mehrmann and Mr. Hall controverting key elements of Burke's testimony, was never requested. Clearly, by the Trial Court failing to particularize the testimony for and against petitioner, testimony vital to the jury's determining the credibility of Burke and also proving petitioner's lack of criminal intent before it for consideration in its proper perspective.

There is no way, of knowing the extent to which the jury utilized testimony properly applicable to others (on the other level of the conspiracy) as to the other defendants, who were clearly guilty of criminal acts for the purpose of reaching its guilty verdict as to petitioner.

## II.

Upon the trial it was developed that petitioner had no connection with the conspirators other than Burke. The stipulation by petitioner that the instrument was involved in interstate commerce enabled the Court to sever the petitioner from the trial upon the Court's own motion, and would not have worked any hardship upon the prosecution.

In the case of *United States* v. *Bonanno*, 177 F. Supp. 106 at pp. 113, it was held that:

> "It is true that a trial so massive and complicated that no jury could follow the evidence or separate Defendants from each other would be a deprivation of due process."

## III

Appellant was clearly found guilty on the basis of the testimony of Burke. The charge never indicated to the jury in any way that Burke was a conspirator and that inferences could be drawn from that fact.

The Court, as previously set forth, did, to the contrary, specifically tell the jury on the trial that Burke could not anticipate any arrangements for leniency based upon his testimony.

The refusal by the Trial Court to permit cross-examination of Burke to establish that he reasonably anticipated leniency as a reward for his testimony was clearly violative of petitioner's rights under the 6th and 14th Amendments to the Constitution of the United States.

Cross-examination to impeach Burke was vital to petitioner's defense.

In the case of *Pointer* v. *Texas*, 380 U.S. 400, 404, 405 this very contention was set forth at length as follows:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, *e. g.*, 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts* throughout

the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby* v. *United States*, 174 U. S. 47, 55, 56, referred to the right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." Mr. Justice Stone, writing for the Court in *Alford* v. *United States*, 282 U. S. 687, 692, declared that the right of cross-examination is "one of the safeguards essential to a fair trial." And in speaking of confrontation and cross-examination this Court said in *Greene* v. *McElroy*, 360 U. S. 474:

> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." 360 U. S., at 496-497 (footnote omitted).

These are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 U. S. 257, this Court said:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S., at 273 (footnote omitted).

In the case of *Barber* v. *Page,* 390 U.S. 719, 725

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness."

## IV

The Trial Court did deprive petitioner of his right to due process and a full cross-examination of Burke so as to impeach his credibility. The Trial Court, in fact, *testified* to the jury that no promises, or even delicate hints to Burke of leniency, might have influenced his testimony. The Trial Judge, of course, may not be cross examined, so that the prosecution had the benefit of a witness awesome to a jury, whose testimony was not subject to cross examination or rebuttal in the trial court. The impact of this highly prejudicial error can most clearly be seen to have had its result in that the only testimony the jury requested to have reviewed (800) was concerning the meetings of and between Burke and petitioner. The Trial Judge effectively gave testimonial support to Burke. ***This error cannot be said to be harmless.*** In arriving at this conclusion the test to applied as to whether error is harmless is not, whether other proof of guilt is overwhelming but whether we are able "to say beyond a reasonable doubt . . . that (the error) did not contribute to the finding of guilty." (See *Chapman* v. *California,* 388 U.S. 18, 23, 24.)

## CONCLUSION

The questions presented are substantial involving basic questions of constitutional right and are worthy of review.

Dated: Brooklyn, New York

Respectfully submitted,

WILLIAM SPARAGO
50 Court Street
Brooklyn, N. Y.
*Counsel for Petitioner*

## Relevant Docket Entries

| DATE | PROCEEDINGS |
|---|---|
| 1-12-72 | Filed copies of docket entries and notice of appeal (Michaels). |
| 2- 3-72 | Filed copies of docket entries and notice of appeal (Rallo). |
| 2-23-72 | Filed record (original papers of district court) (Cohn). |
| 3-30-72 | Filed motion for leave to file appellant's brief and appendix with proof of service (Cohn). |
| 3-31-72 | Filed order granting motion for leave to file appellant's brief and appendix to 4-24-72; if appellant's brief and appendix is not filed by time directed, Clerk is directed forthwith to dismiss appeal; U.S. to file brief by 5-24-72; argument of appeal to be heard during week of 6-5-72 (Rallo). |
| 3-31-72 | Filed order directing that brief and appendix of appellant be filed by 4-24-72; if appellant's brief or appendix is not filed by time directed, Clerk is directed forthwith to dismiss appeal; U.S. to file brief by 5-24-72; argument of appeal to be heard during week of 6-5-72 (Cohn). |
| 3-31-72 | Filed order directing that brief and appendix of appellant be filed by 4-24-72; if appellant's brief or appendix is not filed by time directed, Clerk is directed forthwith to dismiss appeal; U.S. to file brief by 5-24-72; argument of appeal to be heard during week of 6-5-72 (Michaels). |

*Relevant Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 4–24–72 | Filed motion for extension of time to perfect appeal and for leave to dispense with filing an appendix with proof of service (Cohn). |
| 4–25–72 | Filed order dismissing appeal (Michaels). |
| 4–26–72 | Filed order granting motion for extension of time to file appellant's brief to 4-28-72; appellant's request for leave to dispense with filing an appendix is denied except that time to file appendix is extended to 5-3-72 (Cohn). |
| 4–28–72 | Filed motion for extension of time to file brief and appendix with proof of service (Cohn). |
| 5– 1–72 | Filed order granting motion for leave to file appellant's joint brief today (Cohn and Rallo). |
| 5– 1–72 | Filed joint brief, appellant's (Cohn and Rallo). |
| 5– 3–72 | Filed joint appendix with proof of service (Cohn and Rallo). |
| 5– 5–72 | Issued certified copy of order dismissing appeal (Michaels). |
| 5–24–72 | Filed brief, appellee's, with proof of service. |
| 6– 6–72 | Received docket fee (Rallo) (& in 72-1601). |
| 6– 6–72 | Filed stipulation and order (endorsed) granting leave to docket appeal out of time (Rallo) (& in 72-1601). |
| 6– 7–72 | Argument heard (by: Friendly, Ch.J., Lumbard and Mulligan C.J.J.) (& in 72-1601). |
| 6– 7–72 | Affirmed in open court. |

*Relevant Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 6- 7-72 | Filed judgment. |
| 6-19-72 | Issued Mandate (judgment). |
| 6-28-72 | Filed motion to recall mandate with proof of service. |
| 7- 2-71 | Filed Indictment. |
| 7-12-71 | ANTHONY RALLO—Pleads Not Guilty. Bail cont'd ($45,000 PRE sec by 10% cash) Motions ret in 10 days.<br>DOMINIC FORTE—Pleads Not Guilty. Bail cont'd ($50,000 PRE sec by 10% cash) Motions ret in 10 days.<br>FREDERICK COHN—<br>WILLIAM BURKE—<br>MORTON MICHAELS—<br>No appearances. Court directs entry of not guilty pleas. Assigned to Judge Metzner for all purposes. MACMAHON, J. |
| 10- 4-71 | F. COHN—Filed notice of pre-trial motions for discovery and inspection, bill of particulars, etc. and affidavit. METZNER, J. |
| 10- 4-71 | F. COHN—Filed memo of law in support of motion dated this date. METZNER, J. |
| 10-15-71 | F. COHN—Filed memo—endorsed on motion dtd 10-4-71. "Counsel advised the Court that the Govt has agreed to furnish information satisfactory to the movant." (m/n) METZNER, J. |
| 11- 3-71 | Filed Govt's bill of particulars. METZNER, J. |

*Relevant Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 11– 5–71 | W. BURKE (atty present) Deft changes his plea of not guilty and now PLEADS GUILTY to count 1 only. Pre-sentence investigation ordered, sentence 12-15-71. METZNER, J. |
| 11–12–71 | Filed Govt's amended bill of particulars. METZNER, J. |
| 11–12–71 | Filed Govt's request to charge. METZNER, J. |
| 11–16–71 | Dominick Forte—deft withdraws his plea of not guilty and PLEADS GUILTY to count 1 only. Pre-sentence investigation ordered. Sentence (no date) Deft cont'd on present bail. METZNER, J. |
| 11–16–71 | Before Metzner, J. Jury trial begun as to defts A. Rallo, F. Cohn and M. Michaels. |
| 11–17–71 | Trial cont'd. |
| 11–18–71 | Trial cont'd. |
| 11–22–71 | Trial cont'd. On Govt's motion bench warrant for deft Michaels is vacated. |
| 11–23–71 | Trial cont'd and concluded. Jury verdict All Deft GUILTY on all counts 1 & 2. Deft Rallo and Michaels cont'd on present bail. Deft Cohn cont'd released on his own recognizance. P.S.J. ordered for all defts. Sentence date for all defts 1-7-72 at 10 AM. METZNER, J. |
| 11–23–71 | Filed Government's memorandum of law. |
| 11–23–71 | Filed Government's second memorandum of law. |
| 1– 7–72 | MORTON MICHAELS—Filed notice of appeal to the USCA. |

*Relevant Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 1- 7-72 | MORTON MICHAELS (atty present) Filed judgment—It is adjudged that the defendant is hereby committed to the custody of the Atty Gen or his authorized representative for imprisonment for a period of Two (2) YEARS on each of counts 1 and 2 to run concurrently with each other. Deft. cont'd on present bail of $5,000 personal recognizance bond secured by 10% cash until he posts bail pending appeal fixed in the same amt. METZNER, J. |
| | Commitment and copies issued to Marshal. |
| 1- 7-72 | WILLIAM BURKE (atty present) Filed Judgment. It is adjudged the imposition of sentence on count 1 suspended. Deft. placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Count 2 is dismissed on motion of deft's counsel with the consent of the Govt. METZNER, J. |
| 1-14-72 | FREDERICK COHN—Filed Judgment (atty present) It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS on each of counts 1 and 2, to run concurrently with each other. Deft released on his own recognizance pending appeal. METZNER, J. |
| | Commitment and copies issued to Marshal. |
| 1-19-72 | FREDERICK COHN—Filed notice of appeal. Fee of $5. paid. |

*Relevant Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 1–21–72 | ANTHONY RALLO—Filed Judgment (atty present) It is adjudged that the deft is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS on each of counts 1 and 2 to run concurrently with each other. Deft. is cont'd on his present bail to post a personal recognizance bond fixed at $45,000 secured by 10% cash, pending appeal. METZNER, J. |
| | Commitment and copies issued to Marshal. |
| 1–20–72 | Filed memorandum dated 1-20-72 by Cannella, J. —Gov'ts motion for an order modifying a previous order of this Court dated Sept. 10, 1971 is granted in part and denied in part. (See memorandum filed.) (Mailed notice.) |
| 1–28–72 | A. Rallo—Filed notice of appeal from jdgmt. dtd. 1-21-72. $5.00 fee Pd. |
| 2–10–72 | Filed transcript of record of proceedings dated Nov. 16, 17, 18, 19, 22 & 23, 1971. |

A TRUE COPY
JOHN LIVINGSTON, Clerk

By E. A. BECKER
Deputy Clerk

## Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,

—v.—

ANTHONY RALLO, FREDERICK COHN, WILLIAM BURKE, DOMINICK FORTE, and MORTON MICHAELS,

*Defendants.*

---

The Grand Jury charges:

1. From on or about the 1st day of January, 1971 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, ANTHONY RALLO, FREDERICK COHN, WILLIAM BURKE, DOMINICK FORTE, and MORTON MICHAELS, the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 2314 of Title 18, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would transport in interstate commerce and foreign commerce securities of the value of $5,000 and more knowing the same to have been stolen, converted or taken by fraud in violation of Title 18, United States Code, Section 2314.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 28th day of January, 1971 FREDERICK COHN went to the office of SIDNEY GRANT.

2. On or about the 3rd day of February, 1971 FREDERICK COHN boarded a train for Baltimore, Maryland.

3. On or about the 4th day of February, 1971 FREDERICK COHN received $10,000 from SIDNEY GRANT.

4. On or about the 4th day of February, 1971 WILLIAM BURKE received $7,500 from FREDERICK COHN.

5. On or about the 4th day of February, 1971 WILLIAM BURKE gave DOMINICK FORTE $7,200.

6. On or about the 5th day of February, 1971 DOMINICK FORTE went to the Pan American Airways Building.

7. On or about the 5th day of February, 1971 ANTHONY RALLO and MORTON MICHAELS went to East 44th Street across from the Pan American Airways Building.

(Title 18, United States Code, Section 371)

SECOND COUNT

The Grand Jury further charges:

On or about the 3rd day of February, 1971, in the Southern District of New York, ANTHONY RALLO, FREDERICK COHN, WILLIAM BURKE, DOMINICK FORTE and MORTON

*Indictment*

MICHAELS, the defendants, unlawfully, wilfully and knowingly, did transport in interstate commerce, to wit, from New York, New York, to Baltimore, Maryland, securities of the Treasury Bill, No. 730 749A, with a face value of $50,000, knowingly the same to have been stolen converted and taken by fraud.

(Title 18, United States Code, Section 2314)

JEROME E. LANCASTER
Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

## Judgment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71 Cr. 742

---

UNITED STATES OF AMERICA

v.

FREDERICK COHN

---

On this 14th day of January, 1972 came the attorney for the government and the defendant appeared in person and by Jacob P. Lefkowitz, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly transporting in interstate commerce securities of the value of $5,000 and more, knowing the same to have been stolen, converted and taken by fraud (Title 18, U.S. Code, Section 2314); conspiracy so to do (Title 18, U.S. Code, Section 371) as charged in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted,

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2)

*Judgment*

YEARS on each of counts 1 and 2, to run concurrently with each other.

Defendant released on his own recognizance pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CHARLES F. METZNER
*United States District Judge*

JOHN LIVINGSTON
*Clerk*

# In the Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-43

FREDERICK COHN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The court of appeals affirmed without opinion.

### JURISDICTION

The judgment of the court of appeals was entered on June 7, 1972. The petition for a writ of certiorari was filed on July 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether it was error for the trial judge not to summarize and "particularize" the evidence.

2. Whether the trial judge improperly curtailed the cross-examination of a co-conspirator as to expectations of leniency.

## STATEMENT

After trial by jury in the Southern District of New York, petitioner was convicted of unlawfully transporting a stolen security in interstate commerce, in violation of 18 U.S.C. 2314, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to imprisonment for two years. The court of appeals affirmed.

Since the petition does not set forth all the relevant evidence against petitioner, we state it here in some detail. The evidence at trial showed that Dominick Forte, a government witness, approached William Burke, who was also a government witness, concerning the disposal of $250,000 worth of stolen U.S. Treasury bills which he did not think were "hot" since "nobody will look for [them] * * * for three years" (Tr. 53-56, 404-405).[1] Burke obtained one original $50,000 bill and copies of others (Tr. 72, 409-410).

On January 24, 1971, Burke took the genuine bill to the home of Charles Mehrmann, who placed a call

[1] Forte had been supplied the bills by co-defendant Morton Michaels, who had obtained them from co-defendant Tony Rallo (Tr. 404-405, 411-412).

to petitioner, an associate of his law firm (Tr. 80-84). Burke told petitioner that the bills could be purchased for 30 per cent of face value and that the profit on resale by petitioner would be split three ways (Tr. 88).[2]

At a subsequent meeting between Burke and petitioner, Bernard Hall, a partner in Mehrmann's law firm, refused to have anything to do with the bill unless he could get an affidavit of ownership from Burke (Tr. 93). Petitioner later told Burke that Hall was too cautious and that he had already made arrangements to cash the bill (Tr. 95-96).

On February 3, petitioner went to Baltimore to try to sell the bill but was unsuccessful (Tr. 295). In New York, he arranged the sale of the $50,000 bill through Sidney Grant, to whom he promised $10,000 for selling the bill on a "green deal," *i.e.*, all cash and no receipts (Tr. 289-292, 317-323, 356-357).

Late in the afternoon of February 3, petitioner told Burke he would have $10,000 for him the next day, and the balance the following week (Tr. 118). Petitioner did bring Burke $7,500 on February 4, and the two discussed how to use the money they expected to get and how to dispose of other bills. Petitioner said the next batch would have to be moved in Europe (Tr. 119-124). Burke gave Forte $7,200 (Tr. 125).

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[2] Burke testified that Mehrmann did not participate in the conversation after the introduction (Tr. 153-154). Mehrmann testified that he was present most of the time and that Burke assured him that the bill was not stolen (Tr. 499-500).

Petitioner was arrested on February 4 at Grant's office by an F.B.I. agent posing as a banker, after petitioner revealed that he had other bills to cash (Tr. 274-275).

## ARGUMENT

1. In light of the evidence, it is clear that, contrary to petitioner's contention (Pet. 7-8), the trial judge did not act unfairly in failing to summarize the evidence. The trial judge stated that the trial had been a short one and that the jury had heard the summations of counsel, in which they pointed out the portions of the proof on which they urged the jury to rely. He therefore saw no reason to further detail the contentions of the parties or the specific proof (Tr. 776). While Michaels and Rallo were on trial with petitioner, and some of the evidence related to them, their part in the conspiracy consisted of supplying the bill and the photostatic copies of the other bills to Burke and receiving the proceeds. Despite petitioner's attempt to portray himself as a minor figure in the events, the major part of the evidence pertained to his dealings with Burke and his attempts to pass the bill. Under the circumstances, therefore, summarization of the testimony as to petitioner alone was unnecessary.[3]

2. During cross-examination of Burke, he testified that no promise had been made to him for his

[3] Petitioner suggests (Pet. 8) that his prosecution could have been severed from that of his co-defendants, but apparently does not contend that denial of severance was erroneous or even that severance was ever requested.

testimony (Tr. 166). He was asked whether, in his presence, his attorney had asked the Assistant United States Attorney about Burke's chance of going to jail (Tr. 167). The following then occurred (Tr. 167):

> THE COURT: Let's get something straight. In the Federal Court nobody makes any deals regarding sentences, and the Assistant United States Attorney cannot make any recommendations to me as to what sentence I will impose.
>
> MR. LEFKOWITZ: That may be before your Honor. But it is done with other judges.
>
> THE COURT: In the Federal Court in the Southern District of New York, every one of the 24 judges—
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> MR. LEFKOWITZ: I am not going to argue with the Court, but I am practitioner of this court.
>
> THE COURT: Okay.
>
> Q. In any event, you didn't ask, did you?
>
> A. No. And my attorney didn't ask. He did not ask Mr. Horowitz, in my presence.

Burke was then cross-examined at length as to discussions with the Assistant United States Attorney as to possible disbarment (Tr. 183-184); as to his interview with an F.B.I. agent (Tr. 197-201); and as to his hope of consideration for his cooperation (Tr. 234). Burke again testified that there had been no discussion with the prosecutor about a likely sentence (Tr. 236) but did testify that another Assistant United States Attorney told him that con-

spiracy was not considered a felony in state courts and thus not a ground for automatic disbarment (Tr. 238-240).

The judge's statement of which petitioner complains (Pet. 11) merely brought out to the jury that there could have been no agreement as to sentence. Contrary to petitioner's contention (Pet. 9-11), as can be seen from the above exchange and the cross-examination allowed thereafter, the judge did not curtail the right of the defense to cross-examine Burke as to any expectations of consideration in return for his testimony. Thus there was no violation of petitioner's right to confront the witnesses against him.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

HENRY E. PETERSEN,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
FREDERICK W. READ, III,
*Attorneys.*

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